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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 MARK D. KLEINSASSER,

9 Plaintiff,

v.

10 PROGRESSIVE DIRECT INSURANCE  
11 COMPANY, et al.,

12 Defendants.

CASE NO. C17-5499 BHS

ORDER REQUIRING AN  
EVIDENTIARY HEARING  
AND REQUESTING ADDITIONAL  
RESPONSES

13 This matter comes before the Court on Plaintiff Mark Kleinsasser's ("Plaintiff")  
14 motion to remand (Dkt. 14). The Court has considered the pleadings filed in support of  
15 and in opposition to the motion and the remainder of the file and hereby rules as follows:

16 **I. PROCEDURAL HISTORY**

17 On April 1, 2016, Plaintiff filed a class action complaint against Defendants  
18 Progressive Direct Insurance Company and Progressive Max Insurance Company  
19 (collectively, "Progressive") in Pierce County Superior Court for the State of  
20 Washington. Dkt. 1-2 ("Comp."). Plaintiff seeks to recover diminished value on a class-  
21 wide basis and individual loss of use damages under the Underinsured Motorists Property  
22

1 Damage (“UIM”) provision of his insurance contract with Progressive. *Id.* Plaintiff  
2 alleged that the total amount of compensatory damages would be “approximately  
3 \$3,010,903.” *Id.*

4 On June 28, 2017, Progressive removed the matter to this Court. Dkt. 1.

5 On July 28, 2017, Plaintiff filed a motion to remand challenging both the timing of  
6 the removal and Progressive’s calculation of damages. Dkt. 14. On August 28, 2017,  
7 Progressive responded. Dkt. 24. On September 1, 2017, Plaintiff replied. Dkt. 29.

## 8 II. FACTUAL BACKGROUND

9 On September 18, 2015, an uninsured driver hit Plaintiff’s vehicle causing  
10 significant damage. Comp., ¶ 1.8. The vehicle was towed to a repair shop, and Plaintiff  
11 submitted a claim to Progressive. *Id.* ¶ 6.7. Plaintiff was without the use of his vehicle  
12 until November 24, 2015, and, on two separate occasions, he returned the vehicle to the  
13 repair shop for additional repairs. *Id.* ¶ 1.9. Plaintiff alleges that Progressive failed to  
14 provide him with a rental car or otherwise reimburse him for the loss of use of his  
15 vehicle. *Id.* ¶¶ 6.7, 6.11. Plaintiff also alleges that Progressive failed to compensate him  
16 for the diminished value of his vehicle. *Id.* ¶¶ 6.2–6.5.

17 Plaintiff claims that Progressive’s failure to compensate its insured for diminished  
18 value has been “systematic and continuous” and has affected a large number of insureds  
19 over time. *Id.* ¶ 5.1. As such, Plaintiff seeks certification of a class as follows:

20 All PROGRESSIVE insureds with Washington policies issued in  
21 Washington State, where the insured’s vehicle damages were covered under  
Underinsured Motorist coverage, and

22 1. the repair estimates on the vehicle (including any supplements)  
totaled at least \$1,000; and

1           2. the vehicle was no more than six years old (model year plus five  
2           years) and had less than 90,000 miles on it at the time of the accident; and  
3           3. the vehicle suffered structural (frame) damage and/or deformed  
4           sheet metal and/or required body or paint work.

5           Excluded from the Class are (a) claims involving leased vehicles or  
6           total losses, and (b) the assigned Judge, the Judge's staff and family.

7           *Id.*, ¶ 5.3. Plaintiff alleged that “the total amount sought in compensatory damages in this  
8           action will be approximately \$3,010,903,” based on “approximately 2107 claims” and  
9           “\$1429 per claim on average as the average damages recoverable.” *Id.* ¶ 2.5.

10           On June 28, 2017, Progressive removed the matter to federal court asserting that  
11           the Court has jurisdiction under the Class Action Fairness Act of 2005 (“CAFA”), 28  
12           U.S.C. § 1332(d). Dkt. 1. Progressive conducted an independent search of its database  
13           and concluded that the total amount of damages exceeds \$5,000,000, which is the  
14           jurisdictional minimum for CAFA jurisdiction. *Id.* ¶¶ 19–31. Progressive submitted two  
15           declarations in support of this calculation. Frist, Michael Silver, a master data analyst for  
16           Progressive, conducted a review of Progressive's records. Dkt. 2, Declaration of Michael  
17           Silver (“Silver Decl.”), ¶¶ 1, 3. Mr. Silver constructed search criteria that matched his  
18           understanding of Plaintiff's class definition and “identified 3,814 claims that fit the  
19           search criteria.” *Id.* ¶ 8. Mr. Silver, however, “was unable to eliminate claims involving  
20           leased vehicles from the proposed class through electronic searches because Progressive  
21           does not regularly record this information as part of its claims data.” *Id.* ¶ 9.

22           Second, Kevin Rehkme, a claims supervisor for Progressive, conducted a manual  
          inspection of Progressive's claim files in order to determine the proportion of leased  
          vehicles within the claims identified by Mr. Silver. Dkt. 3, Declaration of Kevin

1 Rehkme, ¶¶ 1, 4. Mr. Rehkme declares that he did not review a sample of claims  
2 within the proposed class because “insureds do not always inform Progressive when they  
3 purchase a vehicle they had previously been leasing.” *Id.* ¶ 4. Instead, Mr. Rehkme  
4 reviewed a sample of claims wherein the vehicle was a total loss. *Id.* ¶ 5. In total-loss  
5 claims, he “could identify whether the vehicle was leased or owned by identifying total  
6 loss payments to lienholders and then reviewing the claims notes.” *Id.* ¶ 7. Upon review  
7 of 172 total-loss claims, he found that ten claims involved leased vehicles or 5.8%. *Id.* ¶  
8 10. Mr. Rehkme concluded that it is reasonable to assume that 5.8% of the claims  
9 identified by Mr. Silver should be excluded from the class list. *Id.* ¶ 11.

10 On July 28, 2017, Plaintiff moved to remand challenging Progressive’s assertion  
11 that CAFA jurisdiction existed and submitted evidence in support of its position.<sup>1</sup>  
12 Plaintiff’s expert, Dr. Bernard Siskin, reviewed Mr. Silver and Mr. Rehkme’s  
13 declarations and claims that they made two specific errors as follows:

14 a. Remove all vehicles that have only non-Class related damage  
15 (such as to lights, chrome bumpers, etc., i.e., damage that is not to  
frame/structure and/or body/paint);

16 b. Accurately determine the percentage of leased vehicles because  
17 they have used as a starting point a biased and improper sample which  
dramatically understates the percentage of leased vehicles.

18 Dkt. 14-1 at 7–14, Declaration of Bernard Siskin (“Siskin Decl.”), ¶¶ 4–5. After  
19 explaining why Mr. Rehkme’s assumptions and analysis were flawed, Dr. Siskin  
20 concludes as follows:

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21 <sup>1</sup> Although Plaintiff attempted to submit three exhibits under seal, the Court is unable to locate  
22 these documents in the record. Plaintiff filed placeholders for the exhibits, *see* Dkts. 14-1, 14-2, 14-3, but  
failed to actually file the documents on the record under seal.

1 If I apply the expected percentage (9.5%) based upon lease rates in  
2 Washington, the Class Size would be 3,452 claims [3,814 claims x 90.5%]  
which would be \$4,932,908 in damages at \$1,429/claim.

3 If I apply the percentage I have derived from Mr. Rehmke's flawed  
4 sample (by adjusting the population to account for his under sampling of  
leased vehicles) of 10.3%, the Class size would be 3,421 claims [3,814  
claims x 89.7%] which would be \$4,888,609.

5 If I apply the percentage inflation in the lease rate in the class  
6 compared to that among non class damaged cars (3.36\*5.8% or 19.5%), the  
Class size would be 3,070 claims [3,814 claims x .80.5%] which would be  
\$4,387,030.

7 *Id.* ¶¶ 13–15.

8 Dr. Siskin then discusses flaws in Mr. Silver's analysis. Mr. Silver assumed that  
9 "vehicles with repair estimates of at least \$ 1,000 would have sustained either structural  
10 damage, deformed sheet metal, and/or required body or paint work." Silver Decl., ¶ 6.  
11 Dr. Siskin contends that this assumption is flawed because, based on data from a previous  
12 diminished value case, "accidents with over \$1,000 in damages can result from damages  
13 to only replaceable parts that do not require painting (such as lights, grills, chrome  
14 bumpers, etc.), and these type of accidents are not uncommon." Siskin Decl., ¶ 16. For  
15 example, a headlight assembly for a 2016 Honda Accord has a list price of \$1,140.87. *Id.*  
16 n.5. Accounting for these claims, Dr. Siskin further reduced Progressive proposed class  
17 size by concluding as follows:

18 [T]he actual class size would be 3,372 (using the 9.5% figure for leased vehicles)  
19 or 3,372 (using the 10.3% figure I have derived from Mr. Rehmke's under-  
sampled sample) or 2,999 (using the 19.5% figure based on Allstate data on the  
20 relationship between the lease rate of class vehicles and non-class damaged  
vehicles). This would be respectively \$4,818,588 (using 9.5% leased vehicles) or  
21 \$4,77,718 [sic] (using 10.3% leased vehicles) in damages or \$4,285,571 (using the  
19.5% leased rate).

22 *Id.* ¶ 18.

1 In response, Progressive employed an expert, Dr. Michael Salve, who pointed out  
2 flaws in Dr. Siskin's work and provided other conclusions. Dkt. 27, Declaration of Dr.

3 Michael Salve. First, Dr. Salve declares that

4 [a]side from the obvious fact that [Dr. Siskin's] estimates vary by a factor  
5 of more than 100% and that Dr. Siskin has not stated which estimate he  
6 thinks is correct, I find that the calculation methodologies that underlie all  
three of these estimates are deficient and misleading and that the estimates  
themselves are unreliable.

7 *Id.* ¶ 8. The errors are based on a misinterpretation of a leading car publication, a  
8 deficient and misleading attempt to correct for bias in Mr. Rehmke's work, and an  
9 unsupported comparison of vehicle lease rates from Dr. Siskin's work in an earlier  
10 Allstate case. *Id.* ¶ 9–15.

11 Second, Dr. Salve concluded that the average claim would be \$1,854.08. *Id.* ¶ 20.  
12 Dr. Salve based this number on Dr. Siskin's average claim amount in the older Allstate  
13 matter, which was \$1,386.87, and increased it proportional to the average increase in  
14 retail selling prices for cars during the time period between the older case and this case.  
15 *Id.* ¶¶ 16–19.

16 In reply, Plaintiff submits additional evidence from Dr. Siskin and Darrell Harber,  
17 a professional in the auto and auto repair industry. Dr. Siskin declares that Dr. Salve  
18 made numerous errors in his critique and in his conclusions. Dkt. 30 at ¶¶ 5–13. Dr.  
19 Siskin also declares that, in a similar diminished value case, he applied his statistical  
20 model for damages to an actual sample and determined that damages were "\$590.96 per  
21 claim." *Id.* ¶ 16.  
22

1 Mr. Harber declares that he provides actual diminished value estimates for  
2 customers. Dkt. 31, Declaration of Darrell Harber, ¶¶ 4–5. Mr. Harber claims that most  
3 insurers reject smaller diminished value claims outright, but will pay claims for higher  
4 amounts. *Id.* ¶ 7. Thus, Mr. Rehmke’s sample based on diminished value claims that  
5 were paid is “highly misleading” because the proposed class consists of insureds with  
6 smaller, rejected claims. *Id.* ¶ 8.

### 7 III. DISCUSSION

8 In this case, Plaintiff moves to remand based on the amount in controversy and the  
9 timing of the removal. The Court will address both issues.

#### 10 A. Amount in Controversy

11 “A defendant generally may remove a civil action if a federal district court would  
12 have original jurisdiction over the action.” *Allen v. Boeing Co.*, 784 F.3d 625, 628 (9th  
13 Cir. 2015). CAFA vests federal district courts with original jurisdiction over class  
14 actions involving more than 100 class members, minimal diversity, and at least  
15 \$5,000,000 in controversy, exclusive of interests and costs. *Dart Cherokee Basin*  
16 *Operating Co. v. Owens*, 135 S. Ct. 547, 552 (2014) (citing 28 U.S.C. § 1332(d)). A  
17 defendant seeking removal under CAFA must file a notice of removal “containing a short  
18 and plain statement of the grounds for removal.” 28 U.S.C. § 1446(a); *see also Dart*  
19 *Cherokee*, 135 S. Ct. at 551.

20 The burden of establishing removal jurisdiction remains on the party seeking  
21 removal. *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006).  
22 “When, as here, ‘a defendant’s assertion of the amount in controversy is challenged . . .

1 both sides submit proof and the court decides, by a preponderance of the evidence,  
2 whether the amount-in-controversy requirement has been satisfied.” *LaCross v. Knight*  
3 *Transp. Inc.*, 775 F.3d 1200, 1202 (9th Cir. 2015) (quoting *Dart Cherokee*, 135 S.Ct. at  
4 554)). “The parties may submit evidence outside the complaint, including affidavits or  
5 declarations, or other ‘summary-judgment-type evidence relevant to the amount in  
6 controversy at the time of removal.’” *Ibarra v. Manheim Investments, Inc.*, 775 F.3d  
7 1193, 1197 (9th Cir. 2015) (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d  
8 373, 377 (9th Cir. 1997)). Then “the district court must make findings of jurisdictional  
9 fact to which the preponderance standard applies.” *Dart Cherokee*, 135 S. Ct. at 554  
10 (citing H.R.Rep. No. 112–10, p. 16 (2011)). “[W]hen the defendant relies on a chain of  
11 reasoning that includes assumptions to satisfy its burden of proof, the chain of reasoning  
12 and its underlying assumptions must be reasonable ones.” *LaCross*, 775 F.3d at 1202  
13 (9th Cir. 2015) (citing *Ibarra*, 775 F.3d. at 1199). “Under the preponderance of the  
14 evidence standard, if the evidence submitted by both sides is balanced, in equipoise, the  
15 scales tip against federal-court jurisdiction.” *Id.* at 1199.

16 In this case, the parties contest the potential size of the class, the average amount  
17 of each potential claim, and the amount of awardable attorney’s fees. Regarding the  
18 potential class size, the parties have created a battle of experts and lay witnesses requiring  
19 findings of fact. Both parties start with a proposed class size of 3,567 based on a list  
20 produced by Progressive. Dkt. 24 at 4 n.2; Dkt. 32-1 at 1. Then the parties extrapolate to  
21 exclude the potential number of leased vehicles within that group. The extrapolations are  
22 based on underlying facts and assumptions. When the facts are established, Progressive

1 bears the burden to show that the “chain of reasoning and its underlying assumptions” are  
2 reasonable. *LaCross*, 775 F.3d at 1202. Therefore, the Court will schedule an  
3 evidentiary hearing on the matter to resolve the conflicting facts.

4       Regarding the amount of each claim, the parties have also created a battle of  
5 witnesses requiring findings of fact. This battle, however, seems more relevant to the  
6 amount in controversy than class size due to the wide variance in the estimated amounts.  
7 Based on the current record, the spectrum of average potential individual damages ranges  
8 from \$590.96 to \$1,854.08. If the Court adopts either one of these extremes, then the  
9 potential number of claims appears to be immaterial.<sup>2</sup> As such, it is curious that both  
10 parties rely on assumptions and speculation when actual numbers seem attainable. For  
11 example, each party could pick ten potential class members, submit the claims to an  
12 independent assessor, like Mr. Harber, and have the assessor return twenty estimates to  
13 produce an actual number representing an average claim amount. Of course an  
14 extrapolation would still be necessary to reach an amount representing the amount in  
15 controversy, but the chain of reasoning and underlying assumptions would be based on  
16 this class instead of other data. The parties have invested so much time, effort, and  
17 expense into disputing hypothetical class sizes and amounts that actual underlying  
18 evidence may be warranted. Regardless, the Court will also set this matter for hearing to  
19 resolve the factual disputes.

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22       <sup>2</sup> Back-of-the-envelope calculation.

1 Finally, with regard to attorney’s fees, the parties dispute an unresolved question  
2 of law. In the complaint, Plaintiff alleges that he “and the members of the proposed Class  
3 are entitled to . . . statutory attorney’s fee allowed by RCW 4.84.015 (\$200.00).” Comp.  
4 ¶ 7.1(c). Progressive contends that if Plaintiff “seeks to recover \$200 for each class  
5 member, that would result in an additional \$718,557.60 of damages.” Dkt. 1, ¶ 31. In  
6 the motion to remand, Plaintiff argues that this is a meritless throw-away argument. Dkt.  
7 14 at 12. Progressive responds with a paragraph of its own. Dkt. 24 at 11–12. Because  
8 resolution of the facts regarding potential class size and potential claim amount could  
9 result in a conclusion that the amount in controversy is between approximately  
10 \$4,300,000 and \$5,000,000, resolution of this \$700,000 potential award could be relevant  
11 to the ultimate conclusion. As such, the parties have inadequately briefed the issue.  
12 Therefore, the Court requests additional briefing on this issue.

### 13 **B. Timing**

14 Plaintiff argues that Progressive’s removal was untimely. Dkt. 14 at 13. The  
15 Court will not engage in a lengthy analysis of this issue because this is a preliminary  
16 order and because Plaintiff’s counsel has repeatedly made the same argument to this  
17 Court in numerous cases. It is black letter Ninth Circuit law that a defendant’s subjective  
18 knowledge regarding the potential amount in controversy does not trigger the second  
19 thirty-day removal period. *Roth v. CHA Hollywood Med. Ctr., L.P.*, 720 F.3d 1121, 1126  
20 (9th Cir. 2013) (“we are inclined to think that the sentence should be understood in  
21 context to mean only that a ‘defendant’s subjective knowledge cannot convert a non-  
22 removable action into a removable one”). Giving defendant step-by-step instructions on

1 how to search its database to determine the potential amount in controversy seems  
2 irrelevant whether a defendant acts or fails to act because, at most, acting will result in  
3 defendant's subjective knowledge of the potential class size. Applied to this case,  
4 Plaintiff's argument that Progressive's "counsel had plenty of occasion to inquire  
5 reasonably of Progressive how its claims data reflects on the accuracy of class size  
6 estimate alleged by Plaintiff in his Complaint without the benefit of discovery" is  
7 irrelevant. Absent any evidence of objective knowledge, the Court may be easily dispose  
8 of this argument.

#### 9 10 **IV. ORDER**

11 Therefore, it is hereby **ORDERED** that the parties shall meet and confer and then  
12 submit a briefing schedule, including a deadline for proposed findings of fact, and a  
13 proposed hearing date. The parties shall file the proposed schedule no later than October  
14 20, 2017.

15 Dated this 10th day of October, 2017.

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17 

18 BENJAMIN H. SETTLE  
19 United States District Judge  
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